STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-270-H
v.	)	PERB Decision No. 893-H
CALIFORNIA STATE UNIVERSITY, LONG BEACH,	)	July 23, 1991
Respondent.	)	

Appearances: Teven C. Laxer, Representative, for California State Employees' Association; William B. Haughton, Attorney, for California State University, Long Beach.

Before Hesse, Chairperson; Camilli and Carlyle, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California State Employees' Association (CSEA) of an administrative law judge's (ALJ) proposed decision (attached hereto) which held that the California State University, Long Beach (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a) and (b)[1] when it denied an

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. HEERA section 3571(a) and (b) state, in pertinent part:

> It shall be unlawful for the higher education employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

employee the right to be represented by her employee organization during a meeting on March 28, 1990 and July 17, 1990. The Board has reviewed the entire record, the proposed decision, CSEA's exceptions, and CSU's response thereto, and finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopts them as the decision of the Board itself consistent with the following discussion.

In its exceptions, CSEA only excepts to the ALJ's remedy. Specifically, CSEA objects to the ALJ's failure to invalidate and purge Thelma Laguana's (Laguana) notice of suspension and subsequent suspension. CSEA contends that the ALJ had authority to nullify the suspension and should have purged the notice of suspension since it was prepared after the March 28, 1990 meeting.

In response to CSEA's exceptions, CSU argues that the notice of suspension was never introduced into evidence by CSEA and is not part of the record evidence in this case. Further, the merits of the suspension were not litigated in the PERB proceeding because the amended complaint did not include any allegations of discrimination or reprisal. Even assuming the suspension was part of the record, CSU argues there is no

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employees because of their exercise of rights guaranteed by this chapter.
For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

evidence in the record to support the proposition that the notice of suspension was based on any information obtained by CSU in the March 28, 1990 meeting.

In the discussion regarding the appropriate remedy, the ALJ properly concluded that CSEA's requested remedies were inappropriate. She determined that neither the letter of reprimand nor counseling memoranda were a product of the March 28 and July 17, 1990 meetings. With regard to the suspension, the ALJ stated the following in a footnote:

> As stated supra, at p. 6, fn. 3, Laguana's suspension is not an issue in this case. At the time of the hearing, both the letter of reprimand issued March 28, 1990, and the notice of suspension issued April 30, 1990, and her subsequent suspension were being challenged before the State Personnel Board. (ALJ's proposed decision, p. 26, fn. 7.)

While it may be true that the letter of reprimand and suspension were being challenged before the State Personnel Board, this fact does not preclude PERB from deciding whether these documents should be invalidated and purged from Laguana's personnel file. (See Trustees of the California State University (SUPA) (1990) PERB Decision No. 805b-H, app. pending.) However, in the present case, the notice of suspension and subsequent suspension were never entered into evidence. Further, there is no testimony regarding these suspensions. Without any evidence in the record, it would be impossible to determine whether the suspension was a product of the March 28 or July 17, 1990 meetings, and therefore subject to a purge order. (See Redwoods Community College District (1983) PERB Decision No. 293, affirmed

Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523].)

The ALJ correctly noted that the allegations regarding CSU's discriminatory or retaliatory actions against Laguana were withdrawn prior to the hearing. During the hearing, the ALJ repeatedly explained to the charging party that the discrimination/reprisal allegations were not part of the complaint, and that the charging party was free to file a separate unfair practice charge alleging discrimination or reprisal.

Finally, the ALJ cited both Redwoods Community College District, supra, PERB Decision No. 293 and Taracorp Industries, (1984) 273 NLRB 221 [117 LRRM 1497] to support her rejection of CSEA's requested remedies. In Taracorp Industries, supra, the National Labor Relations Board (NLRB) held that a make whole remedy (i.e., reinstatement and backpay) is inappropriate in Weingarten[2] cases. As the suspension is not part of the record and there is no evidence that the letter of reprimand and/or counseling memoranda were a product of the March 28 and July 17, 1990 meetings, the Board agrees with the ALJ's conclusion that a purge order would be inappropriate.

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[2]In NLRB v. Weingarten (1975) 420 U.S. 25 [98 LRRM 2689], the NLRB held that an employee is entitled to a representative at an investigatory interview which the employee reasonably believes will lead to disciplinary action.

ORDER

For the reasons stated above, the Board hereby AFFIRMS the ALJ's proposed decision and order.

Member Carlyle joined in this Decision.

Member Camilli's concurrence begins on page 6.

Camilli, Member, concurring: In accord with my dissent in Trustees of the California State University (SUPA) (1990) PERB Decision No. 805b-H, appeal pending, I do not subscribe to the portion of the majority decision which cites that case for the proposition that PERB is not precluded from determining matters which are currently before the State Personnel Board. Because I find that portion of the decision to be inessential, I respectfully concur.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-270-H
v.	)	
CALIFORNIA STATE UNIVERSITY, (LONG BEACH),	)	PROPOSED DECISION (3/7/91)
Respondent.	)	

Appearances: Richard G. Funderburg, Senior Employee Relations Representative, for California State Employees' Association; William B. Haughton, Senior Labor Relations Counsel, for California State University (Long Beach).

Before W. Jean Thomas, Administrative Law Judge

PROCEDURAL HISTORY

On April 10, 1990, the California State Employees' Association (hereafter CSEA or Charging Party) filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB or Board) against the California State University (Long Beach) (hereafter CSU or Respondent). The charge alleged violations of sections 3571(a), (b), and (d) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or Act).[1] The charge was amended on June 11, 1990, to add

[1]The HEERA is codified at Government Code section 3560, et seq. All section references, unless otherwise indicated, are to the Government Code.

> 3571. UNLAWFUL EMPLOYER PRACTICES
>
> It shall be unlawful for the higher education employer to do any of the following:

allegations of additional unfair conduct by the employer.

On June 29, 1990, the Office of the General Counsel of PERB, after an investigation of the charge,[2] issued a complaint.

The complaint alleged that the Respondent violated sections 3571(a) and (b) when it denied an employee the right to be represented by her employee organization during a meeting on March 28, 1990, that resulted in disciplinary action against the employee.

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> . . . . . .
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> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another. However, subject to rules and regulations adopted by the board pursuant to Section 3563, an employer shall not be prohibited from permitting employees to engage in meeting and conferring or consulting during working hours without loss of pay or benefits.

[2]On June 25, 1990, the Charging Party withdrew certain allegations contained in both the original and the amended charges.

Respondent filed its answer to the complaint on July 17, 1990, admitting certain factual allegations but denying all allegations of unlawful practices.

On July 24, 1990, an informal conference was held to explore voluntary settlement possibilities. No settlement was reached.

On August 6, 1990, Charging Party filed a request to amend the complaint and a second amended charge to add new allegations of unfair conduct that occurred after the complaint was issued. Respondent did not oppose this request.

A formal hearing was held by the undersigned on September 25, 1990. At the beginning of the hearing, Charging Party's request to amend the complaint was granted. A written order granting the request was issued September 26, 1990. The complaint was amended to add the allegation that the Respondent denied the same employee the right to be represented by her employee organization during a meeting held July 17, 1990. Post-hearing briefs were filed November 26, 1990, and the case was thereafter submitted for proposed decision.

FINDINGS OF FACT

The parties stipulated, and it is therefore found, that the Charging Party is a certified employee organization and the Respondent is a higher education employer within the meaning of section 3562. Charging Party is the exclusive representative for bargaining unit 5 which consists of operations-support services employees.

Thelma Laguana is employed by CSU as a custodian and is a member of unit 5. Laguana has worked for CSU for nine years, and has been assigned for the last seven years to the physical education building. Her immediate supervisor as of March 1, 1990, was lead custodian Olga Anderson. Prior to March 1, Laguana and Anderson worked on the same custodial crew for almost one year under the immediate supervision of lead custodian Galo Laguana. Galo Laguana is the husband of Thelma Laguana. Mrs. Laguana felt that she and Anderson had a good working relationship during the time that they were coworkers. Laguana's regular working hours were from 4:00 a.m. to 12:30 p.m.

On March 27, 1990, Anderson had a meeting with the custodians to inform them of a new procedure that they were to follow to order custodial supplies. The procedure involved completing and submitting a written request to Anderson for the supplies needed. Laguana did not attend the meeting because Anderson did not inform her about it.

Within the first two hours of her shift on March 28, 1990, Laguana approached Anderson and asked for various custodial supplies. Anderson informed Laguana that a new procedure had been initiated for requesting and obtaining supplies and that Laguana would have to follow the new procedure to get the supplies that she wanted.

Laguana replied that she was unaware of a new procedure and objected to having to abide by it. During this exchange, a brief but heated verbal confrontation ensued between Laguana and

Anderson over Laguana's objections. The exchange involved Anderson waving her finger close to Laguana's nose and both women yelling at each other. The confrontation ended with Anderson threatening to have Laguana terminated by reporting her conduct to Acey Sykes, the chief of custodial services.

Anderson then called Sykes and asked him to come to Laguana's work area and speak with her about their confrontation. When Sykes arrived, Anderson went into the locker room where Laguana was working to summon her. The two employees had another verbal dispute that included more yelling and finger waving. Sykes intervened, told Laguana she was being insubordinate and directed her to follow Anderson's instructions.

Later that morning, Sykes escorted Laguana to the office of Bill Peters, director of plant operations, for a meeting regarding her confrontations with Anderson.

The March 28, 1990 Meeting

When Sykes and Laguana arrived at Peters' office, Anderson was waiting in the outer office. Sykes left and Peters, Anderson, and Laguana met together. At the formal hearing, Peters and Laguana presented conflicting testimony about the course of events during the meeting as it pertains to Laguana's request for union representation.

According to Laguana, Peters never stated the purpose of the meeting when it began. Peters initiated the discussion by asking her several times why she struck Anderson. Laguana testified that she denied striking Anderson each time she was asked and

stated to Peters that Anderson had "lied." Laguana testified that when these questions started, she asked for union representation and Peters said, "No."

Sometime during this exchange, Peters handed Laguana a letter of reprimand and asked her to sign it. The letter of reprimand charged Laguana with insubordination, striking her supervisor, and refusing to perform her job duties. The letter further indicated that a recommendation for disciplinary action would be made.[3]

Laguana further testified that she told Peters she would have to first read the document. After reading it, she again asked for representation and said that she would not sign the letter. Peters responded by demanding several times that she sign it. He finally stood up and yelled at Laguana that if she did not sign the letter he would call the campus police. Laguana then asked again for representation but signed the letter anyway because she believed she would be arrested if she failed to do so.

This meeting lasted for approximately one and one-half hours. Anderson was present during the entire course of the

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[3]Mrs. Laguana received a notice of 10-day suspension on April 30, 1990, and was subsequently suspended. Charging Party contends that this disciplinary action was based on the questioning of Mrs. Laguana during the March 28 meeting. Respondent contends that one of the bases for the suspension was the reprimand.

At the time of the hearing, the merits of the reprimand and the suspension were being challenged in a proceeding before the State Personnel Board and were not litigated in this case.

meeting. However, she was not called to testify about her recall of what happened.

Peters testified that the meeting was held for the express purpose of issuing the letter of reprimand to Laguana and that the letter was given to Laguana within five minutes after the meeting started. He denies asking Laguana any questions about her confrontations with Anderson before he issued the letter. According to Peters' testimony, he began the meeting by expressing concern to Laguana about her need to better control her "temper." His frame of reference for these comments stemmed from his knowledge that Laguana had received two traffic citations from the campus police and an incident that occurred between her and a student in the shower room of the women's gymnasium. Before this discussion, Laguana had never been counseled by any of her supervisors about perceived problems with her "temper."

Peters admitted that both he and Anderson discussed the substance of the letter of reprimand with Laguana. Even so, Laguana persistently denied all the charges of misconduct. Peters maintained, however, that Laguana never requested the presence of a union representative at any time during the meeting. Peters recalled that toward the end of the meeting, Laguana did say that she wanted to discuss something but decided she would discuss it instead with her union representative. That is his only recollection of Laguana ever mentioning union representation at the meeting.

Peters admitted telling Laguana that he would call the campus police. During this testimony he explained that he only intended to have the police present to serve as a "credible witness" to her receiving the letter. According to Peters, he explained this to Laguana when he made the statement.

Prior to the March 28 meeting, Laguana was aware of her right to representation at certain kinds of meetings with the employer because she had seen a CSEA flyer regarding the "Weingarten Rule"[4] that was distributed on the campus. Peters testified that he was familiar with "Weingarten Rights" and the practice at the campus regarding these rights through training that he received about administration of the union contracts. He testified further that his longstanding practice was to allow representation when an employee requested it.

Weighing the credibility of these two witnesses and their testimony, the balance is tipped in favor of Laguana's account of the meeting. Her recall of the events were more forthright and exact than Peters', even under cross-examination. Peters was less than candid about his knowledge of the content of the discussion that occurred prior to the issuance of the letter of reprimand. He also admitted that he stated he would call the campus police after Laguana refused several times to sign the letter of reprimand. On cross-examination, Peters testified that he frequently used the campus police to witness his issuance of

[4]The Weingarten rule/rights will be discussed, infra.

disciplinary notices to employees. In this case, his testimony about this practice is not believable.

The July 17, 1990 Meeting

On the morning of July 16, 1990, Anderson approached Laguana in a hallway and gave her a counseling memorandum dated July 12, 1990, and asked her to sign it. The memorandum stated that on the morning of July 12, Anderson had found Laguana in a conference room and observed that she appeared to be "dozing or sleeping" at a time when she should have been working. Laguana told Anderson that she wanted to read the memo first. Anderson said, "O.K.," and turned to leave. As Laguana read the memorandum, she became angry, stating to Anderson that she would … not sign it. She also stated to Anderson, who was approximately 20 feet away from Laguana, that Anderson had "better be careful about what she writes." Laguana denied to Anderson that she was in the conference room at the time stated in the memo. She stated that she was working in another area (Locker Room C) at the time and had a witness to that fact. Laguana then refused to sign the memorandum.

The next morning Anderson told Laguana that Peters wanted to see her. On her way to Peters' office, Laguana telephoned CSEA shop steward Eugene Prince and told him that she was afraid she was going to be questioned about "sleeping on the job." Prince told Laguana to go meet with Peters and if certain questions were asked, request the presence of a union representative.

When Laguana arrived at Peters' office, Peters and Leslie Nix-Baker were present. Nix-Baker serves as the personnel officer and employee relations adviser for plant operations.

There is conflicting testimony about what actually occurred next at the meeting. Four witnesses testified about the events that took place during the meeting, and this testimony contains numerous discrepancies. Laguana and Prince testified for the Charging Party. Besides his role as CSEA shop steward, Prince was, at that time, also president of the local CSEA chapter. Peters and Nix-Baker testified for the Respondent. Additionally, Nix-Baker took notes during the meeting which were received as a Respondent exhibit.

Charging Party's Witnesses

Laguana testified that she was not told the purpose of the meeting at the beginning of the session although she suspected that it was about the "sleeping on the job" allegation. According to her account, the meeting began with Nix-Baker questioning her about the "sleeping on the job" charge. Laguana denied the charge and asked Peters and Nix-Baker if they believed Anderson. When they said, "Yes," she asked for the presence of her union representative. At Peters' request, Laguana told Peters Prince's telephone extension number, and Peters then appeared to call Prince. Laguana, who was sitting just a few feet from Peters, heard him say, "Gene, this is Bill Peters. Thelma Laguana is in my office and she wants a union representative." Then he said, "Fine, O.K.," hung up the

telephone, and returned to the table where the three were sitting. Peters told Laguana that Prince would be there shortly. Laguana estimated that the telephone conversation lasted about 20 seconds. She denies being tearful or crying at the time of the telephone call.

Laguana further testified that Peters and Nix-Baker resumed questioning her about sleeping on the job and verbally threatening Anderson. Laguana stated that she did not answer their questions. Instead she started to cry and shake. At that point Nix-Baker asked her if she wanted to go to the restroom to try to compose herself. Laguana left Peters' office and remained outside until Prince arrived approximately 15 minutes later.

Prince testified that he received a telephone call from Peters sometime between 8:00 and 9:00 a.m., telling him that Laguana was in Peters' office and had asked for a representative. Prince responded that he would have to obtain release time from his supervisor and call Peters back. According to Prince, he asked Peters where Laguana was, and Peters told him that Laguana had "broken down" and left the office and Peters thought that she had gone to the women's restroom. Prince obtained Peters' telephone extension number and told him that he would call him back as soon as he obtained release time. Approximately five minutes later, Prince called Peters and told him that he was on his way to Peters' office. Prince arrived approximately 15 minutes after he received the telephone call from Peters. During the second telephone conversation, Peters asked Prince if he

would support him in obtaining a transfer of Laguana. Prince did not respond to this question.

Prince further testified that when he arrived at Peters' office, he saw Laguana standing nearby in the hallway. He could tell from her appearance that she had been crying and was upset. He notified Peters and Nix-Baker that he was present in the building and asked for a few minutes alone with Laguana because he wanted to try to calm her down.

After Prince and Laguana entered Peters' office, the meeting resumed and lasted approximately 45 to 60 minutes. The latter part of the meeting began with Nix-Baker explaining to Prince the purpose of the meeting and what had transpired before his arrival. Among other things, the parties discussed the "sleeping" allegation and the verbal threat that Laguana had made to Anderson. Laguana continued to deny any culpability concerning both matters. Peters and Nix-Baker both indicated that they believed Anderson's version of these incidents rather than Laguana's. The parties also discussed the possibility of transferring Laguana to another work area but were unable to reach agreement on a solution.

During this meeting, Prince raised the issue of "Weingarten rights" with Peters because Laguana had told him that Peters and Nix-Baker had continued to question her after Peters' telephone call to Prince. As the meeting was concluding and Prince and Laguana prepared to leave, Nix-Baker handed Laguana a counseling memorandum from Bill Peters dated July 16, 1990. This memo

stated that Laguana had verbally threatened Anderson on July 16, 1990, when Anderson delivered the July 12, 1990 counseling memorandum to her about "sleeping on the job." The memo said that Laguana's threatening statement was, "You better be careful," which Laguana made to Anderson as she turned to walk away. The memo went on to state that "threatening the supervisor or anyone while on the job was unacceptable behavior" and that Laguana was expected to maintain her temper and control "verbal and physical threats" to her supervisor, coworkers, or anyone else she encountered on the campus. The memo ended by stating that the "unacceptable behavior" might lead to disciplinary action.

Respondent's Witnesses

Peters testified that the purpose of the July 17 meeting was to issue the counseling memorandum to Laguana regarding the July 16 incident and discuss an earlier incident involving Laguana's alleged kicking of another employee. According to Peters, Nix-Baker initiated the discussion by questioning Laguana about the "sleeping" incident and her threatening comment to Anderson. Laguana denied both actions. She asked Peters and Nix-Baker if they believed Anderson, and they both said, "Yes." Nix-Baker also told Laguana that management would not tolerate her behavior any longer. At that point Laguana started to "lose her composure" and asked for union representation.

Immediately thereafter, Peters testified that he obtained Prince's telephone extension number from Laguana and called him.

Peters told Prince that they were meeting about an incident between Laguana and Anderson and that Laguana had requested his presence. During this conversation, Prince told Peters that he would have to obtain release time and call Peters back. According to Peters, he gave Prince his extension number and later, after Laguana left the room, Prince called back and indicated that he would be arriving within a short time.

Peters further testified that during his first telephone conversation with Prince, Laguana had lost her composure and was crying, so was allowed to leave the room after Peters terminated the conversation. According to Peters, Laguana left the room approximately 15 minutes after the meeting began. Peters denies that he continued to question Laguana after the telephone call to Prince. According to him, the discussion resumed only after Prince arrived. He admits that Laguana received the July 16 counseling memorandum at the end of the meeting.

Nix-Baker also testified that the purpose of the meeting was to discuss "performance problems" with Laguana and to issue the July 16 counseling memorandum regarding the July 16 incident with Anderson. In particular, management had concerns about verbal and physical threats that Laguana had made to her supervisor. Also, Laguana allegedly had struck at her supervisor during their March 28 confrontation, had made a verbal threat to Anderson on July 16, and been involved in a kicking incident with a coworker prior to the "sleeping" incident. The "sleeping" incident, according to Nix-Baker, however, was not the focal point of the

meeting. Nix-Baker testified that she started the meeting by explaining to Laguana the reason for summoning her to Peters' office. According to her, approximately two minutes into the discussion about the July 16 incident, Laguana became tearful when they said that they believed Anderson's version of the July 16 incident and asked for union representation.

Nix-Baker recalls that Peters went to his desk and called Prince. Following his conversation with Prince, he returned to the table where they were sitting. Neither Peters nor she questioned Laguana any further nor engaged in more discussion with her. Since Laguana was crying, Nix-Baker recalls that there was an "awkward silence" for a few minutes before Nix-Baker suggested that Laguana go to the women's restroom.

According to Nix-Baker's notes, the meeting began at 8:38 a.m. and Prince arrived at Peters' office at approximately 8:50 a.m. The meeting resumed by Nix-Baker giving Prince a briefing about what had transpired during the first part of the meeting. During the ensuing discussion about the sleeping incident, Peters and Nix-Baker indicated that one of Laguana's coworkers had witnessed Anderson finding Laguana asleep on the job.

According to Nix-Baker, she presented the counseling memorandum to Laguana as the meeting was about to end. Although Nix-Baker regarded Laguana's alleged kicking of the coworker as

a serious matter, she decided not to include any reference to it in the July 16 counseling memorandum.[5]

Credibility Resolutions

The credibility of each witness' account of the chronology of the meeting, prior to Prince's arrival, has been carefully evaluated.

Neither Peters nor Nix-Baker refuted Laguana's testimony that she was not specifically informed at the start of the July 17 meeting that she was summoned to receive a counseling memorandum regarding the July 16 incident with Anderson. Additionally, neither witness refuted Laguana's recitation about the content of Peters' telephone conversation with Prince that she heard while she was in Peters' office. Peters never directly contradicted Laguana's statement that he did not actually complete the telephone call to Prince while she was in the room. Also neither Peters nor Nix-Baker contradicted Prince's testimony about the substance of his two telephone conversations with Peters.

The weight given Peters' testimony about the first part of the meeting was undermined by the fact that his representative

[5]Galo Laguana testified that he witnessed the alleged "kicking" incident. It occurred shortly after the March 28 meeting between Peters and Thelma Laguana. The incident involved a part-time custodial employee named "Maria." As Thelma Laguana walked by Maria, who was sitting on a bench in the work area, Maria stuck her foot in Thelma Laguana's path and kicked at her. His wife was not the instigator of this encounter. Mr. Laguana told his wife to "forget it" and get back to work since she was already having problems with Anderson. According to Mr. Laguana, no supervisor ever questioned him about the incident.

asked leading questions during direct examination about certain critical facts. This, coupled with his general demeanor and evasiveness on cross-examination, detracted from the believability of his version of the facts. His estimate of the time that elapsed between the beginning of the meeting and the time when Laguana left his office conflicts with the times Nix-Baker stated in her testimony and in her notes of the meeting. Yet this contradiction was not accounted for. Peters' recall of certain key facts was less precise and, hence, less reliable than would be expected of one in his position of authority and responsibility. Overall, Peters' testimony was not persuasive where it conflicted with the other witnesses' testimony.

Nix-Baker's recall of the chronology of events during the first part of the meeting was more detailed than Peters'. Although her contemporaneous notes of the meeting provide some substantiation of her testimony, her testimony about the length of the meeting and the subjects covered conflicted with the testimony of Laguana, Prince and Peters. Given the fact that Nix-Baker initiated the opening discussion and conducted most of the questioning of Laguana, her account of what occurred seemed somewhat self-serving and detracted from her credibility.

For these reasons, the Charging Party's version of the facts about the first part of the meeting is credited, to the extent that material disputes have been identified. Specifically, it is found that: (1) Laguana was not informed at the beginning of the July 17 meeting that the purpose of the meeting was to issue a

counseling memorandum and to discuss other management concerns about her overall performance; (2) the questioning of Laguana regarding her conduct on the job lasted longer than two minutes before Laguana asked for union representation; (3) after Laguana requested the presence of her union representative, Peters did appear to make a telephone call to Prince, however, the call was not completed at that time; (4) after Peters completed the purported telephone call, Nix-Baker and Peters resumed some questioning of Laguana and stopped when she lost her composure and began to cry; and (5) Peters actually called Prince for the first time after Laguana left his office to compose herself.

ISSUE

Whether CSU interfered with and denied Laguana the right to union representation during the meetings on March 28 and July 17, 1990, in violation of sections 3571(a) and (b)?

DISCUSSION

CSEA charges that both Laguana and CSEA itself were denied rights provided by HEERA when CSU agent Peters denied Laguana's request for union representation during the meetings on March 28 and July 17, 1990. CSU maintains that Laguana's Weingarten[6] rights were not violated at either meeting because (1) she did not request union representation at any time during the March 28 meeting, and (2) no questions were asked of Laguana at the July

[6]NLRB v. Weingarten (1975) 420 U.S. 25 [98 LRRM 2689] holds that an employee is entitled to a representative at an investigatory interview which the employee reasonably believes will lead to disciplinary action.

17 meeting between the time she requested union representation and the time that she left Peters' office prior to Prince's arrival.

Section 3565 provides, among other things, that higher education employees have a right to ". . . participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations . . . ."

The term "matters of employer-employee relations" has been held to specifically include the right of representation, upon request, at any employer's investigatory interview if the employee reasonably believes that the interview might result in disciplinary action. Rio Hondo Community College District (1982) PERB Decision No. 2 60, adopting the rule of NLRB v. Weingarten, Inc., supra.

In Baton Rouge Waterworks Co. (1979) 246 NLRB 995 [103 LRRM 1056], the NLRB concluded that an employee has no right to union representation at meetings with the employer that are held solely for the purpose of informing the employee of, or acting upon, a previously made disciplinary decision. However, the right to representation attaches where the employer's conduct goes beyond this purpose, and either (1) seeks facts or evidence in support of the disciplinary action, (2) attempts to have the employee "admit his alleged wrongdoing or to sign a statement to that effect," or (3) seeks to have the employee "sign statements relating to such [other] matters as workmen's compensation

. . . ." See Morris, The Developing Labor Law. 2d Ed., pp. 152-153.

In Roadway Express, Inc. (1979) 246 NLRB 1127 [103 LRRM 1050], the NLRB observed that once an employee makes a valid request for union representation, the employer has a choice of one of three options: (1) grant the request; (2) dispense with or discontinue the interview; or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative or of having no interview at all, and thereby dispensing with any benefits which the interview might have conferred on the employee. The employer, however, may not continue the interview without granting the requested union representation unless the employee "voluntarily agrees to remain unrepresented after having been presented by the employer with the choices" described above or "is otherwise made aware of these choices." U.S. Postal Service (1979) 241 NLRB 141 [100 LRRM 1520]

In Regents of the University of California (1983) PERB Decision No. 310-H, the Board concluded that an employee's right to union representation at disciplinary and investigatory meetings as set forth in Weingarten and its progeny is applicable to HEERA cases.

Thus, under the Weingarten rule as interpreted by related cases, several questions must be resolved in the instant case to determine whether Laguana's representational rights were interfered with or denied. First, were the meetings for an

investigatory (as well as disciplinary) purpose which the employee reasonably perceived as a possible pre-disciplinary inquiry? Second, did the employee request union representation during the March 28 meeting? And third, if such request was made, did the employer persist in conducting the meeting without representation or otherwise infringe on the employee's right to representation? This analytical approach will be applied to the facts of each allegation of this case.

The March 28 Meeting

At the March 28 meeting, the employer clearly went beyond merely informing the employee of the imposition of discipline. Although Peters could have satisfied his obligation by allowing Laguana to review the letter of reprimand, comment on it if she so desired, and sign it or refuse to sign it, he went much further. Peters began the meeting, not by informing the employee that she was going to receive a previously-determined reprimand, but rather by questioning Laguana about her alleged misconduct. This action was no doubt an attempt to have her admit that she "struck" Anderson as stated in the disciplinary letter. Even though the Respondent characterizes the meeting as a disciplinary interview, Peters' conduct converted the meeting to one to which the Weingarten protections became applicable.

Since Peters did not inform Laguana at the beginning of the meeting that its purpose was to present her with a letter of reprimand, the general questions that he propounded to her about her "temper" and her March 28 confrontation with Anderson led

Laguana to reasonably believe that the interview would lead to discipline. Once Laguana made her first request for representation during this exchange, Peters was not free to continue with the questioning unless he offered Laguana the option of continuing the interview unaccompanied by a union representative or having no interview at all. There is no evidence that Peters explained these options to Laguana and that she waived her right to representation after making the initial request. However, Peters continued with the interview, eventually issued the reprimand to Laguana, and demanded that she sign it.

Although CSU had the right to require Laguana to give written acknowledgment of receipt of the reprimand, it is concluded that, under this circumstance, she was entitled to representation before being forced to sign the document on March 28. Respondent failed to establish that Peters advised Laguana, before requesting her signature, that signing for receipt of the document did not signify her approval or agreement with the contents of the reprimand. The document itself contains no such indication of that fact. Furthermore, Peters offered no valid justification for insisting that Laguana sign and then threatening to call the campus police when she hesitated to act unadvised about the significance of her signature. Finally, it is noted that Anderson was present during the entire meeting. Thus, even if Laguana had refused to give written acknowledgment

that she received the reprimand, Anderson witnessed that the disciplinary action was acted upon.

Given the intimidating atmosphere created by Peters' actions, as well as Laguana's uncertainty about what signing the document signified, it was not unreasonable for Laguana to believe that she needed the assistance of her union representative to provide advice and direction. Adding to the employee's existing apprehension, the reprimand stated that Peters was recommending further disciplinary action. Based on these facts, Laguana arguably had a right under HEERA to be represented by CSEA before being required to sign the letter of reprimand, and CSEA arguably had a right to represent her. California State Employees' Association v. Regents of the University of California (1984) PERB Decision No. 449-H.

Since it is clear that these rights were not accorded to Laguana, it is concluded that CSU's failure to grant Laguana's repeated requests for representation during the March 28, 1990 meeting violated section 3571(a) by interfering with Laguana's statutory right to representation. The same conduct also violated section 3571(b) by denying CSEA the ability to effectively give the aid and protection sought by a unit member.

The July 17 Meeting

Obviously the July 17, 1990 meeting with Laguana was not solely for the purpose of issuing the counseling memorandum to her. While the Respondent contends that the meeting was primarily a disciplinary interview, it concedes that Peters and

Nix-Baker also wanted to discuss other job performance "problems" with Laguana. In fact, the interview started without any mention that the employer was going to take corrective action against Laguana during the meeting. The memorandum was not addressed until it was issued to Laguana at the end of the meeting after lengthy discussion had occurred. Instead the July 17 meeting began with Laguana being required to participate in a discussion with two high-level department administrators and respond to questions about her work performance and a dispute with her supervisor.

Faced with this situation, Laguana's reasonable belief that disciplinary action would result from the interview was implicit in her request for union representation. Unquestionably, this part of the meeting was more akin to an investigatory interview than it was disciplinary. This conclusion is supported by Nix-Baker's testimony that Peters and she wanted to hear "Thelma's side of the story" before issuing the memorandum. Following ,Laguana's request for representation, the employer should have ceased all questioning of the employee until her requested representative arrived or Laguana expressed willingness to continue with the meeting unaccompanied by her representative.

However, after Peters' purported telephone call to Prince, the questioning was resumed without any objective evidence that Laguana agreed to remain unrepresented during this interim. The atmosphere created by the continued questioning was apparently so overpowering to Laguana that she became emotionally upset, began

to cry, and eventually had to leave the room to regain her composure. It's difficult to otherwise conceive of how just two minutes of questioning, as Nix-Baker claims, would have produced such a reaction by the affected employee.

Respondent failed to present any convincing evidence to rebut the conclusion that the first part of the July 17 meeting was other than an investigatory interview. Given this finding, it is determined that the employer was required to refrain from further interview of the employee until the requested representative was present. However since the questioning continued, Laguana was denied her valid right to representation.

It is thus concluded that CSU's failure to grant Laguana's request for union representation during the first part of the July 17, 1990 meeting violated section 3571(a) by interfering with Laguana's statutory right to representation. This conduct also denied CSEA the right to represent its unit member in violation of section 3571(b).

REMEDY

Section 3563.3 gives PERB the power to:

> . . . issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action . . . as will effectuate the policies of this chapter.

In this case, it has been found that CSU violated section 3571(a) by denying a bargaining unit employee the right to be represented by her exclusive representative at two meetings during which the employer's conduct went beyond the mere

imposition of disciplinary action. CSU's conduct also violated section 357l(b) in that it denied the exclusive representative the right to represent a unit member during such meetings, under the circumstances described herein.

CSEA argues for a remedy that (1) invalidates the April 30, 1990 notice of suspension which it alleges resulted from the questioning of Laguana during the course of the March 28, 1990 meeting, (2) directs the Respondent to purge Laguana's personnel file of all adversarial documents related to the March 28 and July 17, 1990 meetings, including the letter of reprimand and the two counseling memoranda, and (3) directs the Respondent to cease and desist from taking further retaliatory actions against Laguana.

There is no basis to award such a remedy in this case. The letter of reprimand and the counseling memoranda that the Charging Party seeks to have expunged were both prepared prior to the respective meetings held with Laguana. Neither was based in whole, or in any part, on any information or other evidence acquired by the Respondent as a result of the meetings. Unlike Redwoods, where a memorandum prepared after a meeting was ordered purged, here there is no product of either meeting which can be the subject of a purge order.[7] Redwoods Community College District (1983) PERB Decision No. 293, affd. sub nom. Redwoods

[7]As stated supra, at p. 6, fn. 3, Laguana's suspension is not an issue in this case. At the time of the hearing, both the letter of reprimand issued March 28, 1990, and the notice of suspension issued April 30, 1990, and her subsequent suspension were being challenged before the State Personnel Board.

Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523]; Taracorp Industries (1984) 273 NLRB 221 [117 LRRM 1497]. Charging Party's allegations regarding Respondent's retaliatory actions against Laguana were withdrawn prior to the hearing and thus not litigated in this proceeding.

In order to remedy the unfair practice committed by the Respondent and to prevent it from benefiting from its unfair conduct, it is appropriate to order the Respondent to cease and desist from interviewing Thelma Laguana, under the circumstances set forth herein, after she has specifically requested the presence of a union representative at such interview, unless such representative is present.

It is also appropriate that the Respondent be required to post a notice incorporating the terms of this order. The Notice should be subscribed by an authorized agent of the California State University (Long Beach) indicating that it will comply with the terms thereof. The Notice shall not be reduced in size, defaced, altered or covered by any other material. Posting such a notice will provide employees with notice that Respondent has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the Respondent's readiness to comply with the ordered remedy. See Davis Unified School District, et al. (1980) PERB Decision No. 116 and Placerville Union School District (1978) PERB Decision No. 69.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record of this case, it is found that the California State University (Long Beach) violated sections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act. Pursuant to Government Code section 3563.3, it is hereby ORDERED that the California State University (Long Beach) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interviewing Thelma Laguana, under the circumstances set forth herein, after she has specifically requested the presence of a union representative, unless such representative is present.

2. Denying to the California State Employees' Association rights guaranteed to it by the Higher Education Employer-Employee Relations Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEES RELATIONS ACT.

1. Within ten (10) workdays of service of a final decision in this matter, post at all locations where notices to employees are customarily posted, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent for the California State University (Long Beach), indicating that the University will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive calendar days. Reasonable steps shall be

taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

2. Within thirty (30) workdays of service of a final decision in this matter, notify the Los Angeles Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Code of Regulations, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Code of Regulations, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service

shall accompany each copy served on a party or filed with the Board itself. See California Code of Regulations, title 8, sections 32300, 32305 and 32140.

Dated: March 7, 1991

W. JEAN THOMAS
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-270-H, California State Employees' Association v. California State University (Long Beach), in which all parties had the right to participate, it has been found that the California State University (Long Beach) violated sections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Interviewing Thelma Laguana, under the circumstances set forth herein, after she has specifically requested the presence of a union representative, unless such representative is present.

2. Denying to the California State Employees' Association rights guaranteed to it by the Higher Education Employer-Employees Relations Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

Within ten (10) workdays of service of a final decision in this matter, post at all locations where notices to employees are customarily posted, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent for the California State University (Long Beach), indicating that the University will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive calendar days. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

Date:

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED WITH ANY OTHER MATERIAL.